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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 898

NORTON D. McKINNEY,

Petitioner,

vs.

GEORGIA H. McKINNEY KELLEY,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

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NORTON D. McKINNEY,

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Motion For Leave To File Petition For Rehearing.

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case because, as is pointed out more fully in the annexed petition, subsequent to the filing of the certiorari petition this Court handed down its decision in *Kovacs v. Brewer*, 356 U. S. ___, 26 U. S. L. W. 4365, No. 200, October Term, 1957, holding that, absent a showing of changed circumstances between the dates of two conflicting custody decrees of sister states, the prior custody decree of the first state is entitled to full faith and credit in the other. In the instant case the prior Connecticut decree of May 29, 1956 denied the paramour of the respondent wife custody of his own three children and he was divorced by his wife on the ground of desertion. Vermont consequently de-

nied such decree full faith and credit when it thereafter determined that respondent and her paramour, who is now her second husband and in privity with her, were in fact fit custodians of petitioner's child although the only intervening circumstance between the two decrees was respondent's remarriage on September 21, 1956 to the ~~paramour~~ paramour who had previously broken up the two homes.

Moreover, it now conclusively appears that petitioner was also denied due process of law by the Vermont Supreme Court as the result of that court's failure even to receive or consider his evidence, including the prior Connecticut judgment roll, which was certified to it for review by the trial judge; also that the state court's determination there had been no "arbitrary disregard" of petitioner's evidence was indeed contrary to the fact. These intervening facts were disclosed only after the filing of the certiorari petition on April 4, 1958.

Lastly, the Court in *Kovacs v. Brewer, supra,* held these matters of conflicting custody decrees of sister states present "difficult and important questions of constitutional law" which were "explicitly" reserved from that decision but which should now be resolved in this case.

A rehearing is respectfully requested in view of the foregoing intervening circumstances of substantial or controlling effect, pursuant to Rule 58(2).

Dated: June 25, 1958.

ALBERT G. AVERY,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 898

NORTON D. McKINNEY,

Petitioner,

VS.

GEORGIA H. McKINNEY KELLEY,

Respondent.

Petition For Rehearing Of Order Denying Petition For Writ of Certiorari.

Petitioner prays that this Court grant rehearing of its order of June 2, 1958 denying the petition for writ of certiorari (356 U. S. ____, 26 U. S. L. W. 3353) and that a writ of certiorari issue to review the judgment of the Vermont Supreme Court in the above entitled case as prayed for in the petition filed April 4, 1958.

Reasons For Granting Rehearing and Issuing The Writ.

1. Rehearing will be granted where there has been an intervening and controlling Supreme Court decision (*Bradley Min. Co. v. Boice*, 345 U. S. 932; *Zap v. United States*, 330 U. S. 800; *Jones v. Opelika*, 316 U. S. 584, 589; *Helvering v. Sprouse*, 316 U. S. 656; *Pickett v. Union Terminal Co.*, 313 U. S. 591, 314 U. S. 704, 315 U. S. 386; *Triplett v. Lowell*, 296 U. S. 570, 621; *Massey v. United States*, 291

U. S. 608, 655, 669). The certiorari petition herein was filed April 4, 1958 and the intervening decision in *Kovacs v. Brewer*, 356 U. S.____, 26 U. S. L. W. 4365, was handed down on May 26, 1958.

2. In *Kovacs* this Court at the outset recognized that "difficult and important questions of constitutional law" were presented by the claim that North Carolina had violated the Full Faith and Credit Clause in refusing to recognize a prior New York custody decree. While remanding the case to North Carolina to ascertain whether there were "changed circumstances" arising between the date of the New York decree and the subsequent contrary decree in North Carolina the Court stated that the constitutional questions thus presented, "we explicitly reserve without expressly or impliedly indicating any views about them." The dissenting opinion however made plain the actual effect of such action when it said (26 L. W. 4368):

> "Whatever may be the Court's formal disavowal, a federal question can be found for review here only if the Court requires, however implicitly, that North Carolina give full faith and credit to the second New York decree. For if the Supreme Court of North Carolina is obliged to find that 'circumstances have changed' since the second New York decree in order not to be bound by it, it *must be that that decree has legal significance under the Full Faith and Credit Clause.*" (Italics ours.)

This is the prevailing rule. See *Restatement: Conflict of Laws*, Sec. 147, comment (a); *Halvey v. Halvey*, 330 U. S. 610, 618; *Ehrenzweig: Interstate Recognition of Custody Decrees*, 51 Mich. L. R. 345, 356-7; *Stumberg: Children and the Conflict of Laws*, 8 U. of Chicago L. R. 42, 57, 58; *Goodrich: Custody of Children in Divorce Suits*, 10 Cornell L. Q. 1, 7:

"The great weight of authority holds that a decree made by a court having jurisdiction awarding custody of the children is conclusive as to all matters up to the time of rendition of the decree and will be recognized and given effect in another state. * * * Ancient history, i. e. matters prior to the first decree, cannot be gone into; and the person seeking to disturb the *status quo* will have to show what new circumstances have arisen calling for a change."

See also: *Goodrich: op. cit.* at pp. 9-10. *Morrill v. Morrill,* 83 Conn. 479 states this is the rule in Connecticut.

3. Here it was established that respondent left her family in Vermont for her paramour, Kelley; that petitioner thereupon divorced her in Vermont in 1953; that she refused to give up Kelley or accord petitioner his visitation rights under the divorce decree;[1] that in consequence Kelley was thereafter divorced by his own wife in Connecticut in 1956 and denied the custody of his own three children. This prior determination by Connecticut that the paramour was an unfit custodian was entitled to recognition and enforcement in Vermont under the Full Faith and Credit Clause, absent a showing of changed circumstances subsequent to the Connecticut decree, and "difficult and important questions of constitutional law" were presented by Vermont's refusal to give it recognition (*Kovacs v. Brewer, supra*). No changed circumstances were shown by respondent to avoid the effect of the Connecticut decree. On the contrary, she defaulted in Vermont and did nothing. Her subsequent marriage to the paramour in 1956 did not constitute a change of circumstances making him a fit custodian of his own children in Connecticut; *a fortiori* it could not be the basis for a subsequent finding in Vermont that he is now a fit cus-

[1] This situation still continues. On May 13, 1958 her Connecticut counsel wrote: "Mrs. McKinney Kelley informs me that she can not consent to Mr. McKinney's request for visitation."

todian for petitioner's child in his present status as respondent's new husband with whom she is now in privity (*Litchfield v. Goodnow,* 123 U. S. 549, 551). The question of her husband's fitness as custodian has been conclusively determined by the Connecticut decree and it is not subject to collateral attack subsequently in Vermont (*Hoag v. New Jersey,* 356 U. S. ____, 26 L. W. 4307, 4309, decided May 19, 1958; *So. Pac. R. R. v. United States,* 168 U. S. 1, 48-49; *Restatement: Judgments,* Secs. 83, 87, 90, 111 comment (a); 1 *Freeman: Judgments* (5th ed.) Sec. 480, p. 1038; *Res Judicata,* 65 Harv. L. R. 861).[2]

4. Not only are these considerations forcibly brought forward by the intervening decision in *Kovacs v. Brewer, supra,* they are emphasized by the further intervening circumstances that since the filing of the certiorari petition it was established that the Connecticut decree and *all* of petitioner's other exhibits were never even delivered to or considered by the Vermont Supreme Court although duly certified there by the trial judge. Even the dissenting opinion in *Kovacs v. Brewer,* 26 L. W. at 4367, while holding that custody decrees were transitory, pointed out:

> "To say this is not to say that a court should pay no attention to a prior decree or to the *status quo* established by it. *These are, of course, among the relevant and even important circumstances that a court should consider when exercising judgment on what the welfare of a child before it requires.*" (Italics ours.)

Thus it cannot be said that the highest Vermont court reviewed *all* the evidence and then based its determination upon an adequate non-federal ground and petitioner's further claim that he was deprived of his federal right to due process by the failure of the state court to consider

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[2] The collateral estoppel division of *res judicata* is included within the Full Faith and Credit Clause (Goodrich C. J. in *United States v. Sillimen,* 167 F. (2) 607, 621, cert. den. 335 U. S. 825, citing *Chicago etc. Ry. Co. v. Schendel,* 270 U. S. 611; *Everett v. Everett,* 215 U. S. 203).

his undisputed proof now stands established and unchallenged. The possible obscurity as to the existence of a non-federal ground for the decision in *Kovacs* which caused the remand of that case for further consideration by the North Carolina Supreme Court of this question does not exist here, as these subsequently discovered facts conclusively establish, consequently the "difficult and important questions of constitutional law" that were explicitly reserved by the Court in *Kovacs* are now ripe for decision here.

5. Under the alternate interpretation of the *Kovacs* decision, set forth in the dissenting opinion *supra*, namely that the prior inconsistent custody decree of a sister state "does have legal significance under the Full Faith and Credit Clause," a substantial federal constitutional question is now plainly and squarely presented for review here. Under either interpretation of the *Kovacs* decision, in view of the existing and increasing welter of confusion, uncertainty and complex problems in custody cases throughout the nation these constitutional questions are serious and important ones which, it is submitted, should be settled in this case by this Court (cf. *Ehrenzweig: Interstate Recognition of Custody Decrees, supra,* 51 Mich. L. R. 345 *et seq.*).

CONCLUSION.

For the reasons above set forth and in the petition for writ of certiorari it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Vermont Supreme Court.

Respectfully submitted,

ALBERT G. AVERY,
Counsel for Petitioner.

Certificate Of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the rules of this Court.

ALBERT G. AVERY,
Counsel for Petitioner.